Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ELLIS FISCHEL STATE CANCER HOSPITAL,
Petitioner,

v.

RAYMOND J. DONOVAN
Secretary, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor and the Administrative Law Judge erred in denying petitioner's motion to dismiss and further erred in going forth with the administrative hearing and issuing their order, all contrary to the Eleventh Amendment to the United States Constitution.

2. Whether the order of the Secretary of Labor of August 10, 1979, sustaining the order of the Administrative Law Judge was supported by substantial evidence.

3. Whether the order of the Secretary of Labor of August 10, 1979, sustaining the decision of the Administrative Law Judge was contrary to constitutional right, power, or privilege and was therefore arbitrary and abusive discretion and otherwise not in accordance with law.

4. Whether § 5851 of the Atomic Energy Act of 1954 (42 U.S.C. § 5851(a)) granted to the Secretary of Labor the power to intervene in the internal medical decisions of the medical staff of a state cancer hospital.

TABLE OF CONTENTS

Questions Presented I

Opinions Below 1

Jurisdiction 2

Constitutional Provisions, Statutes, and Federal Regulations Involved 2

Statement of the Case 8

Reasons for Granting the Writ 11

I. That Portion of the Decision Below, Finding that the Eleventh Amendment of the United States Constitution is Not Available as a Defense to States in Administrative Procedures is in Conflict with the Decisions of Other Courts of Appeal and the Applicable Decisions of This Court and as Such Constitutes, an Important Question of Federal Law Which has not Been, but Should be, Settled by This Court 11

II. That Portion of the Decision Below Finding That There was Substantial Evidence to Support the Order of the Administrative Law Judge, as Affirmed by the Secretary of Labor, is in Conflict with the Applicable Decisions of This Court, and as Such Calls for an Exercise of This Court's Power of Supervision 17

III. That Portion of the Decision Below Finding That the Secretary of Labor has Authority Under 42 U.S.C. § 5851 (a) to Interfere in the Internal Medical Decisions of a State Cancer Hospital Misinterprets 42 U.S.C. § 5851 (a), is a Case of First Impression and as Such Constitutes an Important Question of Federal Law Which has Not Been, but Should be, Settled by this Court 19

Conclusion 21

Appendix A (Opinion and Order of the Honorable Samuel H. Chaitovitz, Administrative Law Judge, dated July 10, 1979) A-1

Appendix B (Opinion and Order of the Honorable Ray Marshall, Secretary of Labor, United States Department of Labor, Dated August 10, 1979) A-7

Appendix C (Opinion and Order of the United States Court of Appeals for the Eighth Circuit, Issued September 11, 1980) A-9

Appendix A-17

TABLE OF AUTHORITIES

Breeden v. W. Weinberger, 493 F.2d 1002 (4th Cir. 1974) 19

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971).. 18

Duhne v. State of New Jersey, 251 U.S. 311 40 S.Ct. 154, 64 L.Ed. 280 (1920) 12

Edelman v. Jordan, 415 U.S. 651 94 S.Ct. 1347 39 L.Ed.2d 662 (1964) 12

Employees of the Department of Public Health & Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973) ...12

Hans v. State of Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) 12

Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971) 15

National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) 14

Parden v. Terminal Ry. of Ala. State Docks Dept., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) 12

Quern v. Jordan, 440 U.S. 332 (1979) 12

Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 ..18

Victor Products Corp. v. National Labor Relations Bd., 208 F.2d 834 (D.C.Cir. 1953) 19

Misc.

5 U.S.C. § 706 .....2, A-13, A-14, A-15

28 U.S.C. § 1254 (1) 2

42 U.S.C. § 2134 .....3, 19, 20, 21, A-5, A-14

42 U.S.C. § 5851 .....I, 4, 16, 20, A-1, A-5, A-6, A-7, A-12 A-13, A-15

2 A.M.Jur.2d *Administrative Law, Immunity* § 577 15

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ELLIS FISCHEL STATE CANCER HOSPITAL,
Petitioner,

v.

RAY MARSHALL
Secretary, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Ellis Fischel State Cancer Hospital, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 11, 1980.

OPINIONS BELOW

The Opinion of the Honorable Samuel A. Chaitovitz, Administrative Law Judge, dated July 10, 1979 appears in Appendix A hereto. The order of the Honorable Ray Marshall, Secretary of Labor, United States Department of Labor, dated August 10, 1979 appears in Appendix B hereto. The opinion of the United States Court of Appeals for the Eighth Circuit issued on September 11, 1980, but not yet officially reported, appears in Appendix C hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on September 11, 1980, and this petition for Writ of Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL REGULATIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

42 U.S.C. § 2134. Medical therapy, research, and development licenses; limitations

(a) The Commission is authorized to issue licenses to persons applying therefor for utilization facilities for use in medical therapy. In issuing such licenses the Commission is directed to permit the widest amount of effective medical therapy possible with the amount of special nuclear material available for such purposes and to impose the minimum amount of regulation consistent with its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public.

(b) As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefore for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission

shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

(c) The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the conduct of research and development activities of the types specified in section 2051 of this title and which are not facilities of the type specified in subsection (b) of this section. The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

(d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title or except under the provisions of section 2139 of this title. No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

42 U.S.C. § 5851

(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any

employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)—

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

(b) (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of

the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) (1) Any person adversely affected or aggrieved by an

order issued under subsection (b) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5 of the United States Code [5 USCS §§ 701 et seq.]. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order. (2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Whenever a person has failed to comply with an order issued under subsection (b) (2), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) (1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order. (2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Any nondiscretionary duty imposed by this section shall

be enforceable in a mandamus proceeding brought under section 1361 of title 28 of the United States Code [28 USCS § 1361].

(g) Subsection (a) shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended.

(Oct. 11, 1974, P. L. 93-438, Title II, § 210, as added Nov. 6, 1978, P. L. 95-601, § 10, 92 Stat. 2951.)

STATEMENT OF THE CASE

Dr. Clifford Richter, was first employed as a fellow or advanced trainee at the Cancer Research Center, Columbia, Missouri from the years 1972 to 1974. On February 11, 1974, he was elevated to the position of Director or Chief Medical Physicist to head the Medical Physics Department at Ellis Fischel State Cancer Hospital. Dr. Richter also served as radiation safety officer for Ellis Fischel State Cancer Hospital and was required to meet with the Nuclear Regulatory Commission from time to time concerning the Ellis Fischel license and reports and investigations.

On March 28, 1978, a technician discovered certain iridium 192 seeds in a patient, Mrs. McClaskey, upon her return to the hospital following an absence of approximately three and one-half months. The existence of the seeds in the discharged patient constituted a violation of the N.R.C. license granted to the Ellis Fischel State Cancer Hospital. Following discovery of the iridium seeds in Mrs. McClaskey, Dr. Richter reported said fact to the Nuclear Regulatory Commission pursuant to federal rules and regulations.

On April 4, 1978, an executive committee meeting of the medical staff of the Ellis Fischel State Cancer Hospital

was held at which time Dr. Larry Doss made certain complaints against Dr. Richter concerning his functioning as Chief Medical Physicist. Dr. Richter was not in attendance at said executive Committee meeting.

Effective July 1, 1978, the Department of Medical Physic headed by Dr. Clifford Richter was transferred and became a division of medical physics under the Department of Radiation Therapy headed by Dr. Nester Canoy. In December 1978, the Executive Committee with the approval of the Division of Health for the State of Missouri and the Division of Personnel for the State of Missouri, approved the abolition of the position of Chief Medical Physicist resulting in the termination of Dr. Richter and the establishment of the three team concept for the treatment of patients effective January 1, 1979. On December 5, 1978, Mr. Robert Lee, Administrator of Ellis Fischel State Cancer Hospital wrote a letter to Dr. Richter advising him of the abolition of the position of Chief Medical Physicist and the termination of his employment.

Subseqeuntly, on December 13, 1978, Dr. Richter notified Mr. Bob Marsh, United States Nuclear Regulatory Commission, Region 3, that his position had been terminated and that in Dr. Richter's opinion the termination was due to his reporting the discovery of iridium 192 seeds in Mrs. McClaskey. Dr. Richter said his letter was filed pursuant to Title X, Chapter I, Part 10, Paragraph 19.6, Part C of the Code of Regulations.

Subsequently, by letter dated February 2, 1979, Terry Burger, Area Director of the Department of Labor, advised Robert E. Lee, Administrator of Ellis Fischel State Cancer Hospital, that an investigation would be conducted concerning the complaint filed by Dr. Richter. On February 16, 1979, Mr. Burger advised Mr. Lee that as a result of the investigation it was determined that Dr. Richter's termina-

tion from his employment at Ellis Fischel State Cancer Hospital was caused by his reporting to the N.R.C. on March 29, 1978, the existence of iridium 192 seeds in Mrs. McClaskey. On February 29, 1979, D. B. Kammerer, General Counsel, Department of Social Services contacted Terry Burger advising him that the Department of Social Services was appealing his decision and requesting a formal hearing of record.

Finally, on Tuesday, May 1, and Wednesday May 2, 1979, in Columbia, Missouri, the hearing was held before the Honorable Samuel A. Chaitovitz, Administrative Law Judge, on the complaint filed by Dr. Richter. Subsequently, on or about July 10, 1979, the Honorable Samuel A. Chaitovitz, Administrative Law Judge, entered his decision and order, a copy of which is attached hereto as Appendix A.

On August 10, 1979, the Honorable Ray Marshall, Secretary of Labor, United States Department of Labor, entered his decision affirming the finding of the Administrative Law Judge as more specifically set out above. A copy of said order is attached hereto as Appendix B. On or about August 17, 1979, I. Curtis Sears, Attorney for the defendant Ellis Fischel State Cancer Hospital filed a motion for stay of the Secretary of Labor's order pending review by the United States Court of Appeals. On October 2, 1979, the Honorable Ray Marshall, Secretary of Labor, United States of America, denied the aforesaid motion of the Ellis Fischel State Cancer Hospital for stay of his order of August 10, 1979.

On or about September 13, 1979, a petition for review of the order of the Secretary of Labor of August 10, 1979, was filed with the United States Court of Appeals for the Eighth Circuit pursuant to 42 U.S.C. § 5851(c)(1). On or about October 19, 1979, a motion for stay of order of the Secretary of Labor dated August 10, 1979, and sugges-

tions in support thereof were filed with the United States Court of Appeals for the Eighth Circuit. On October 30, 1979, the United States Court of Appeals for the Eighth Circuit entered its order staying the order of the Secretary of Labor reinstating Clifford W. Richter to his former position, pending appeal, staying the Secretary of Labor's order granting Richter retroactive compensation and attorney's fees pending appeal, but modified said order to allow Clifford Richter payment at the rate of compensation he formerly received from the date of the Secretary's order of August 10, 1979, pending appeal and until further order of the court.

On September 11, 1980, the United States Court of Appeals for the Eighth Circuit rendered its judgment and order affirming the order of the Honorable Ray Marshall, Secretary of Labor.

REASONS FOR GRANTING THE WRIT

I.

That portion of the decision below, finding that the Eleventh Amendment of the United States Constitution is not available as a defense to states in administrative procedures is in conflict with the decision of other Courts of Appeal and the applicable decisions of this Court and as such constitutes, an important question of federal law which has not been, but should be, settled by this court.

The Eleventh Amendment to the United States Constitution became effective in 1794 and reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Clearly, the Eleventh Amendment defense is available to the states in litigation, which fact is well documented in decisions of this court. See *Hans* v. *State of Louisiana,* 134 U.S. 1, 10th S.Ct. 504, 34 L.Ed. 842 (1890); *Duhne* v. *State* of *New Jersey,* 251 U.S. 311, 40 S.Ct. 154, 64 L.Ed. 280 (1920); *Parden* v. *Terminal Railroad of Alabama Docks Department,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964); and *Employees of the Department of Public Health and Welfare* v. *Department of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). In *Duhne, supra,* the court stated it most succinctly:

> "But it has been long since settled that the whole term of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent." *Id.* at 311.

Finally, in *Employees supra,* Justice Douglas writing for the majority states as follows:

> "Although the Eleventh Amendment is not literally applicable since petitioners who brought suit, are citizens of Missouri, it is established that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Id.* at 280.

In *Quern* v. *Jordan,* 440 U.S. 332 (1979), this court reaffirmed *Edelman* v. *Jordan,* 415 651, 94 S.Ct. 1347, 39 L.Ed.2d 1662 (1974), without equivication. In *Quern, supra,* the court pointed out:

> "In Edelman we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability, which must be paid from public funds of the state treasury is barred from the Eleventh Amendment." *Id.* at 337.

Thus, petitioner would assert that it is well established that a suit by citizen of the state against his own state is prohibited by the Eleventh Amendment. In the case at Bar, this complaint was initiated by Dr. Clifford Richter against the State of Missouri with a hearing held by an Administrative Law Judge appointed by the United States Department of Labor. If this proceeding had taken place initially in the United States District Court, there is little doubt that it would have immediately been subject to a motion to dismiss based on the Eleventh Amendment defense. However, even though such motion was filed before the Administrative Law Judge hearing this case, and this issue raised before the United States Court of Appeals for the Eighth Circuit the Eleventh Amendment defense was rejected.

Petitioner respectfully suggests that what cannot be done directly through the judicial system of the United States should not be allowed through an administrative proceeding that is at least quasi judicial in nature. Regardless of the forum, it is still a federal forum in which a citizen of the State of Missouri is pursuing a remedy against the State of Missouri which remedy is seeking relief retrospective in nature. Additionally, it should be pointed out that to pursue this matter to its ultimate conclusion, requires Dr. Richter, the complainant herein, to seek enforcement of this relief through the United States District Court in direct controvention of the Eleventh Amendment of the United States Constitution. Petitioners submit that they are entitled to the Eleventh Amendment defense as it applies to an administrative proceeding and that the decision of the United States Court of Appeals for the Eighth Circuit is contrary to the position taken by this court in *Employees, supra.* In *Employees, supra,* this court stated that:

"State mental hospitals, state cancer hospitals, and

> training schools for delinquent girls which are not operated for profit are not propiatary."

Accordingly, petitioner as the state cancer hospital for the state of Missouri is entitled to its Eleventh Amendment defense. See also *National League of Cities* v. *Usery* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

Thus, the only real question is whether or not the Eleventh Amendment defense should apply to an administrative proceeding. Petitioner respectfully submits that the history of this country and justice suggest that said defense should be available to a state in an administrative proceeding. Petitioner would point out that at the time of the adoption of the Eleventh Amendment administrative law proceedings were an unknown commodity. However, with the growth of this country, the growth of the federal government and the complexities of life, administrative law procedings have become a significant part of our entire governmental system particularly at the federal level. In that position, administrative law proceedings are admittedly quasi judicial but the rights, duties and responsibilities of citizens across this country are daily being determined by administrative law tribunals. To say that it is quasi-judicial in nature and therefore not a part of the judiciary, may be accurate but is a fine technical destinction that avoids the realities of modern day government. The fact remains that this court has recognized and continues to recognize the place occupied by administrative law proceedings in our federal government and the validity of the decisions handed down by those administrative law tribunals. Thus, it seems only fair and just that if this court is to recognize the validity of administrative law tribunals and their decisions, this court should also recognize the value of defenses that are available in the judicial courts of this country. Especially, since administrative law tribunals are a means of relieving case load which would ultimately

reside with the United States District Courts were it not for the existence of these administrative law tribunals.

Finally, it would be pointed out by petitioner that the question of sovereign immunity as it exists and applies to administrative proceedings, has been raised on numerous occasions in the various Courts of Appeal of the United States. In that context, the decisions rendered by the Courts of Appeal have not been entirely consistent. However, the availability of sovereign immunity has been upheld as a defense and in *Littell* v. *Morton,* 445 F.2d 1207 (4th Cir. 1971) the court stated as follows:

> "Thus, we are constrained to conceive that the doctrine of sovereign immunity applies independently of the judicial review provisions of APA. A court may thus be compelled under some circumstances to dismiss a case on the ground of sovereign immunity even though judicial review would seem to be available under the APA . . . In any case where the immunity doctrine is so transcending as to require dismissal of the suit, the act (APA) does not provide for administrative review." *Id.* at 1213.

Certainly, if judicial review is not available in an administrative proceeding because of the doctrine of sovereign immunity at the federal level then the doctrine of sovereign immunity through the Eleventh Amendment as applicable to the states should also preclude judicial review of administrative proceedings. In addition, if the Eleventh Amendment precludes judicial review, the question must be asked what purpose is served to proceed with an administrative proceeding which is unenforceable because on review, the Eleventh Amendment precludes review essential to the enforcement of the administrative order.

The availability of sovereign immunity as a defense is also well recognized among legal treatises. In 2 Am.Jur. 2d, *Administrative Law, Immunity* Section 577 it is stated:

> "An important limitation upon the availability of judicial relief from administrative action derives from the rule that the United States, as well as any state, cannot be sued in its own courts, or in any other court, unless by express consent, which rule, in regard to states, is fortified by the Eleventh Amendment of the United States Constitution." *Id.* at 400.

In *Littell, supra,* the court sought support for its position that sovereign immunity was available to preclude judicial review in several decisions of this court.

Petitioner would also point out that it was established in 1940. The Atomic Energy Act was not passed until 1954 and 42 U.S.C. § 5851 was not passed until 1978. Thus, petitioner respectfully submits that it has not waived its sovereign immunity nor consented to this suit, nor can any such claim be validly made. In addition, petitioner's license contains no such waivor or consent.

Accordingly, petitioner respectfully submits that due to the tremendous growth of administrative law in this country and the prominent position of administrative law hearings in this country, this court should finally decide whether sovereign immunity and the Eleventh Amendment defense is available to the several states in said proceedings. In addition, because of the conflicting decisions which have been handed down by the United States Court of Appeals and the decisions handed down by this court relative to the availability of sovereign immunity on judicial review, the question presented is of sufficient import that this court should take jurisdiction and review the decision of the United States Court of Appeals for the Eighth Circuit rendered below.

II.

That portion of the decision below finding that there was substantial evidence to support the order of the administrative law judge, as affirmed by the secretary of labor, is in conflict with the applicable decisions of this court, and as such calls for an exercise of this courts power of supervision.

In its brief before the United States Court of Appeals for the Eighth Circuit, petitioner pointed out that eleven witnesses testified in the proceeding before the administrative law judge and of those, only two testified on behalf of the complainant Dr. Clifford Richter. Further, of the two that testified in behalf of Dr. Richter, only Dr. Richter himself *thought* the actions of the medical staff of the Ellis Fischel State Cancer Hospital were discriminatory in nature. The only witness to testify in behalf of Dr. Richter was not in a position to express an opinion on that subject. On the contrary, no less than five doctors and two hospital administrators testified under oath that their decision to abolish the Department of Medical Physics and subsequently the Division of Medical Physics was based solely on sound medical judgment and totally unrelated to Dr. Richter's report to the Nuclear Regulatory Commission concerning the iridium seeds found in the body of Mrs. McClaskey. Thus, the only direct testimony contained in the record of the administrative proceeding completely refutes the claim of Dr. Richter as well as the finding of the administrative law judge. However, the administrative law judge in his order and opinion, which is attached hereto as Appendix A, makes no mention whatsoever of the testimony of the other nine witnesses in behalf of petitioner, including the five doctors and two hospital administrators who specifically refuted Dr. Richter's claim under oath. Nonetheless, the United States Court of Appeals for the Eighth Circuit totally ignored this issue with the statement

"but their testimony failed in the administrative law judge's view to explain the termination." However, petitioner would point out that no where in the decision of the administrative law judge does he refer to, comment on, or disregard any testimony referred to above.

Petitioner submits that the position taken by the administrative law judge as affirmed by the United States Court of Appeals for the Eighth Circuit is in complete contradiction and conflict with applicable decisions of this court and other courts of appeal. See *Citizens to Preserve Overton Park Inc.* v. *Vople,* 401, 402, 91 S.Ct. 814 (1971); and *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). This court in *Universal Camera Corporation, supra* stated:

> ". . . The substantiality of evidence must take into account whatever in the record *fairly detracts from its weight.* (Emphasis added)." *Id.* at 465.

The court further stated in *Universal Camera Corp., supra*:

> ". . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Boards view.*" (Emphasis added). *Id.* at 465-466.

Petitioners submit that a review of the entire record including that opposed to the decision of the administrative law judge makes it clear that the case is not supported by substantial evidence. In fact, a stronger argument can be made that substantial evidence exists to support the position taken by petitioner that the decision to terminate

Dr. Richter was based solely on the sound medical judgment of the medical staff and hospital administrators of the Ellis Fischel State Cancer Hospital.

See also *Breeden* v. *W. Weinberger* 493 F.2d 1002 (4th Cir. 1974), where the Fourth Circuit Court of Appeals set aside an administrative law judges finding because he refused to accept any of the testimony of "friends and kinfolk" not because it was unbelievable but because of the source. See also *Victor Products Corporation* v. *National Labor Relations Board* 208 F.2d 834 (D.C. Cir. 1953) where the District of Columbia Court of Appeals set aside a Board's finding because of a hearing examiners refusal to accept certain testimony simply because of the order in which that testimony was given.

Therefore, petitioner urges this court to grant certiorari in the instant case because the decision of the Court of Appeals is in conflict with the applicable decisions of this court and as such calls for an exercise of this court's power of supervision.

III.

That portion of the decision below finding that the Secretary of Labor has authority under 42 U.S.C. § 5851 (a) to interfere in the internal medical decisions of a state cancer hospital misinterprets 42 U.S.C. § 5851 (a), is a case of first impression and as such constitutes an important question of federal law which has not been, but should be settled by this court.

Petitioner would point out that 42 U.S.C. § 2134 states as follows:

> (a) The Commission is authorized to issue licenses to persons applying therefore for utilization facilties [sic] for use in medical therapy. In issuing such licenses the Commission is directed to permit the widest amount

> of effective medical therapy possible with the amount of special nuclear material available for such purposes and to impose the *minimum amount of regulation* consistent with its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public. [Emphasis added]

Thus, petitioner submits that while certain rights may be granted to the Secretary of Labor of the United States Department of Labor under 42 U.S.C. § 5851 (a), those rights are limited as are any regulations or oversight of licensees to utilization facilities for use in medical therapy. Such limitation is only for the purpose of promoting the common defense and security and to protect the health and safety of the public. In the instant case, there can be no claim that the purpose for the actions taken by the Secretary of Labor were to promote the common defense and security. Obviously such language is directed primarily at military facilities which utilize nuclear material. In addition, there was simply no evidence to suggest that the existence of the iridium 192 seeds in Mrs. McClaskey did in fact endanger the health and safety of the public. On the contrary, testimony introduced at senate hearings suggested that no such danger did exist any greater than the exposure that might be available to a normal citizen. Petitioner will readily admit that it has been unable to find any case law specifically interpreting the sections involved. However, when analyzing § 2134 and § 5851 together, petitioner respectfully submits that the order of the Secretary of Labor overturning a medical decision of the medical staff of a state cancer hospital is beyond the scope of the authority as intended by the United States Congress.

Therefore, petitioner urges this court to grant certiorari in the instant case because the decision of the Eighth Circuit Court of Appeals misinterprets § 42 U.S.C. § 5851 (a) as

limited by 42 U.S.C. § 2134, is a case of first impression and as such constitutes an important question of federal law which has not been, but should be, settled by this court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

December, 1980

APPENDIX A

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of CLIFFORD W. RICHTER *Complainant,* vs. ELLIS FISCHEL STATE CANCER HOSPITAL *Defendant.*	**Case No. 79-ERA-1**

Carl F. Sapp, Esq.
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Columbia, Missouri 65201
For the Complainant

D. B. Kammerer, Esq.
Curtis Sears, Esq.
Broadway State Office Building
Jefferson City, Missouri 65101
For the Defendant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

Recommended Findings of Fact
Conclusion of Law and Order

STATEMENT OF THE CASE

This case arises under Section 210 of the Energy Reorganization Act of 1974, as amended, (Public Law 95-601, 42 U.S.C. 5851). Dr. Clifford W. Richter filed a Complaint dated December 13, 1978 alleging that he was discharged in violation of Section 210 of the Act (42 U.S.C. 5851)

because he had notified the Nuclear Regulatory Commission concerning certain matters. Defendant requested a hearing in this case.

Pursuant to a Notice of Hearing issued March 29, 1979 a hearing was held before the undersigned on May 1 and 2, 1979 in Columbia, Missouri. Both Dr. Richter and Ellis Fischel State Cancer Hospital were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter, briefs and reply briefs were filed with the undersigned which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following recommended Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Ellis Fischel State Cancer Hospital is a licensee of the Nuclear Regulatory Commission, licensed to use radioactive materials for the purpose of medical therapy.

2. Dr. Clifford Richter, the plaintiff herein, was initially employed by the Ellis Fischel State Cancer Hospital in 1974 as head of the Department of Medical Physics and as Chief Medical Physicist. He was hired pursuant to the recommendations contained in a report of Doctors Almond, Lindberg and Powers, recommending to the Missouri Division of Health that a Department of Medical Physics be established in conjunction with the acquisition of a Linear Accellerator by Ellis Fischel.

3. Dr. Clifford Richter, as an employee and department head, received ratings under the merit system law of outstanding in all categories. The ratings given to him were given by his peers, the Doctors and the then Administrator

Virgil Yates and the ratings ranged from 92% to 97%. All these ratings were made prior to the report made by Richter to the Nuclear Regulatory Commission on March 29, 1978 regarding the irridium radiation seeds implanted in Mrs. Martha McClaskey which left the hospital contrary to the law.

4. In December of 1977 iridium seeds for medical therapy were implanted in Mrs. Martha McClaskey and were removed and she was allowed to leave the hospital. Four seeds of iridium were left in her body. These seeds were discovered in March of 1978 and on March 29, 1978 Dr. Clifford Richter, as Radiation Safety Officer, made a report to the Nuclear Regulatory Commission which prompted an investigation by that agency.

5. Dr. Clifford Richter was Radiation Safety Officer of Ellis Fischel State Cancer Hospital at the time he made the report to the Nuclear Regulatory Commission and it was his duty to make reports to the Nuclear Regulatory Commission.

6. At no time prior to the Richter report to the Nuclear Regulatory Commission were there any formal discussions by the staff or by the executive committee pertaining to reorganization of the Medical Physics Department as a division of the Department of Radiation Therapy.

7. In January of 1978 Virgil Yates, then the hospital administrator, wrote a recommendation for a substantial pay raise for Dr. Richter to the Division of Health which would have increased the salary of Dr. Richter from approximately $39,000.00 per year to approximately $49,000.00 per year. This letter was written prior to the discovery of iridium seeds in Mrs. McClaskey and the Richter report to the Nuclear Regulatory Commission.

8. On April 24, 1978, less than one month after the Richter report to the Nuclear Regulatory Commission Virgil

Yates, the Administrator of Ellis Fischel, wrote an interoffice communication to Dr. Richter admonishing him for making the report to the Nuclear Regulatory Commission without clearing the report with the administration and the staff. Yates stated that the administration and staff would decide what should or would be reported. In April of 1978 the Executive Committee and staff, without discussing the matter with Dr. Richter, abolished the Department of Medical Physics and made it a division under the Department of Radiation Therapy.

9. Following the report of Dr. Clifford Richter, the Nuclear Regulatory Commission made its investigation and report. The Senate of the State of Missouri had a hearing on the matter of Martha McClaskey. The Senate investigation revealed that not only had iridium seeds been left in Martha McClaskey, but that a suture needle was left in Mrs. Martha McClaskey by Dr. Bricker. All staff members, with few exceptions, were required to testify.

10. In October of 1978, without discussing the matter with Nestor Canoy, head of the Department of Radiation Therapy, the administration, executive committee and the staff reorganized the Department of Radiation Therapy to eliminate the position of Chief Physicist although physicists were needed at that time.

11. On December 8, 1978, Dr. Clifford Richter was notified that his job as Chief Physicist had been eliminated and that he would be terminated as an employee.

12. The termination of Dr. Clifford Richter on December 8, 1978 was directly caused by his report to the Nuclear Regulatory Commission that radioactive iridium seeds had been left in Mrs. Martha McClaskey when she was discharged from the hospital and to the series of events that occurred thereafter.

13. Dr. Clifford Richter was paid by the Missouri De-

partment of Social Services through the month of February, 1979, and has received no pay from Ellis Fischel State Cancer Hospital since the dates of his termination, December, 1978. His salary at the time of termination was $39,000.00 per year.

14. Dr. Richter testified that his attorneys fees for this hearing would be $2,500.00.[1]

CONCLUSIONS OF LAW

1. It is concluded that the Act (42 U.S.C. Section 5851(a)) prohibits a Nuclear Regulatory Commission licensee from discharging or discriminating against an employee for commencing a proceeding for the enforcement of any requirement imposed under Section 5851 or the Atomic Energy Act of 1954.

2. It is concluded that 42 U.S.C. 5851(b)(2)(B) grants the Secretary of Labor the power and the authority to make such orders as are necessary to protect persons who have reported infractions of the license requirements of the Nuclear Regulatory Commission and to protect persons who have been discharged as a direct result thereof.

3. It is concluded that, under 42 U.S.C. 2014, 2131 and 2134, "person" is defined as "any state or political subdivision or any political entity within the state . . ." and that the Ellis Fischel State Cancer Hospital is included in the definition of "person".

4. It is concluded that Dr. Clifford Richter was discharged by the Ellis Fischel State Cancer Hospital for acts falling within the protection of 42 U.S.C. Section 5851 and is entitled to be protected by the Department of Labor. Thus, although Ellis Fischel is a State Cancer Hospital

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[1]Counsel for Claimant,in his brief, refers to an investigatory finding by the Department of Labor that Claimant had an additional $1,500.00 in legal expenses prior to the hearing. No evidence was submitted on this issue so, accordingly, no finding can be made.

of the State of Missouri and has the right to make staff and departmental reorganization under the law of the State of Missouri, it may not do so as a pretex to conceal its real objective of discharging Dr. Richter because he engaged in conduct protected by 42 U.S.C. 5851.

Based on the pregoing Findings of Fact and Conclusions of Law it is recommended that the following order be issued:

ORDER

It is therefore ordered and adjudged:

1. That Ellis Fischel State Cancer Hospital and the Missouri Department of Social Services restore Dr. Clifford Richter to his former duties as Chief Medical Physicist together with retroactive compensation in such sum as he was receiving on the date he last received compensation from the Department of Social Services in February of 1979.

2. That Dr. Clifford Richter be restored to his position as Chief Medical Physicist under the same terms, conditions and privileges of employment enjoyed by him prior to his discharge in December of 1978.

3. That the Ellis Fischel State Cancer Hospital of Missouri pay Dr. Richter for his attorneys fees in the sum of $2,500.00.

4. That Ellis Fischel State Cancer Hospital of Missouri remove all adverse references from the personnel file of Dr. Clifford Richter which are therein and which occurred subsequent to his reporting the McClaskey incident to the Nuclear Regulatory Commission.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: JUL 1979
Washington, D.C.

SAC: tf

APPENDIX B

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

CASE NO. 79-ERA-1

In the Matter of CLIFFORD W. RICHTER *Complainant,* vs. ELLIS FISCHEL STATE CANCER HOSPITAL *Defendant.*	**DECISION OF THE SECRETARY**

Clifford W. Richter filed a complaint alleging that he was discharged because of activities to carry out the purposes of the Energy Reorganization Act of 1974, as amended in violation of Section 210 of that Act (92 Stat. 2951; 42 U.S.C. 5851).

A hearing was held before an Administrative Law Judge. Thereafter, the Judge issued a recommended decision dated July 6, 1979, containing his recommended findings of facts conclusions of law, and order. He found that the complainant was discharged by the defendant for acts protected by 42 U.S.C. 5851, in violation of that Section.

On the basis of the entire record, it is my conclusion that the recommended findings of fact, conclusions of law, and order contained in the Administrative Law Judge's recommended decision, dated July 6, 1979, are supported by the evidence, are in accordance with applicable law, and are proper, and I adopt them as my own.

Accordingly, it is ordered and adjudged:

1. That Ellis Fischel State Cancer Hospital and the

Missouri Department of Social Services restore Dr. Clifford Richter to his former duties as Chief Medical Physicist together with retroactive compensation in such sum as he was receiving on the date he last received compensation from the Department of Social Services in February of 1979.

2. That Dr. Clifford Richter be restored to his position as Chief Medical Physicist under the same terms, conditions and privileges of employment enjoyed by him prior to his discharge in December of 1978.

3. That the Ellis Fischel State Cancer Hospital of Missouri pay Dr. Richter for his attorneys fees in the sum of $2,500.00.

4. That Ellis Fischel State Cancer Hospital of Missouri remove all adverse references from the personnel file of Dr. Clifford Richter which are therein and which occurred subsequent to his reporting the McClaskey incident to the Nuclear Regulatory Commission.

Dated at Washington, D.C.
this 10th day of August, 1979

Ray Marshall
Secretary of Labor

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1771

Ellis Fischel State Cancer Hospital,
Petitioner,

v.

Ray Marshall, Secretary, United States Department of Labor,
Respondent,

Clifford W. Richter,
Intervenor/Respondent.

Petition for Review of Order of Secretary, U.S. Department of Labor

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Submitted: March 13, 1980

Filed: September 11, 1980

Before HENLEY and MCMILLIAN, Circuit Judge, and HARPER,* Senior District Judge.

MCMILLIAN, Circuit Judge.

Ellis Fischel State Cancer Hospital (the petitioner), an agency of the State of Missouri, petitions this court for

*The Honorable Roy W. Harper, United States Senior District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

review of an order by the Secretary of the United States Department of Labor (the Secretary), providing reinstatement, back pay, attorney's fees and other relief to Dr. Clifford Richter. The Secretary found that Dr. Richter, a medical physicist, was terminated by petitioner in retaliation for reporting violations by petitioner of federal law in regard to use of radioactive materials. Petitioner argues that the eleventh amendment bars relief to Dr. Richter and that the order was arbitrary and capricious and not supported by substantial evidence. We affirm.

Petitioner is a hospital operated by the State of Missouri on a not-for-profit basis to treat cancer patients and is licensed by the United States Nuclear Regulatory Commission (the Commission) to use radioactive material in therapy. Dr. Richter, who was hired in 1974 as petitioner's chief medical physicist, headed the medical physics department and, as the hospital radiation safety officer, served as the hospital's contact with the Commission. Early in 1978, a patient, whose treatment included the implanting of iridium-192, a radioactive isotope, in her body, was released although some iridium had mistakenly been left in her body. The mistake was discovered about three months later on March 28, 1978, and Dr. Richter promptly reported the mishap to the Commission. The failure to remove the iridium was found by the Commission to have violated a condition of the hospital's license to use regulated radioactive materials in therapy and a Commission regulation, 10. C.F.R. § 35.14(b) (5) (vii). The Commission report on the matter indicated that persons who came in contact with the patient were exposed to significant amounts of radiation, although the exposure was found by the Commission to be within allowable limits based on an estimate of maximum exposure to the patient's spouse if he spent about ten hours a day at a distance of one meter from the patient.

Prior to making the Commission report, Dr. Richter

had consistently received extremely favorable evaluations of his work, and early in 1978, the hospital administrator had recommended a 39% salary increase for Dr. Richter. Six days after Dr. Richter's report to the Commission, the hospital executive committee met and had a critical discussion of the medical physics department. Dr. Richter, although a member of the executive committee, was excluded from the meeting. From April through August of 1978, Dr. Richter received three progressively less favorable evaluations of his work. In June, the Department of Medical Physics was downgraded to a division within the Department of Radiotherapy, resulting in a reduction of status for Dr. Richter. Minutes of a subsequent executive board meeting reported, "Apparently Dr. Richter is not going to resign despite his statement that he would if lost his departmental director position."

In July, after Dr. Richter was connected by hospital staff to the appearance of a newspaper article concerning storage of radioactive materials at the hospital, Dr. Richter received a three-day suspension and a letter of reprimand. The letter of reprimand did not, however, mention any newspaper articles, but instead condemned Dr. Richter for "fail[ing] to extend to the staff and administration of this hospital . . . the professional courtesy to follow normal procedures in bringing problems to the attention of those persons ultimately responsible for the operation of the hospital." This language reiterates criticism in April by the hospital's administrator, who condemned Dr. Richter for making his report to the Commission without first formally reporting the iridium incident internally.

Finally, in December 1978, the hospital staff was again reorganized to eliminate the division of medical physics. At the time, the hospital employed three medical physicists; Dr. Richter was the most senior. Each of the two junior medical physicists was assigned to be a member of a medical

team in the reorganization, but Dr. Richter was laid off, purportedly because the position of chief medical physicist had been abolished. In the administrative proceedings, however, Dr. Nestor Canoy, the hospital's acting chief of staff, testified that after Dr. Richter's layoff the hospital had not had enough medical physicists and needed a chief medical physicist.

After his layoff, Dr. Richter complained to the Commission that he had been terminated in retaliation for his report of the iridium incident in violation of Commission regulatons, 10 C.F.R. § 19.16(c) (1978). The complaint was referred to the Secretary of Labor for procedings under 42 U.S.C. § 5851.[1] A trial was held in May 1979 before an administrative law judge,[2] who made findings and recommended reinstatement of Dr. Richter, back pay, attorney's fees and deletions of adverse references placed in Dr. Richter's file after April 1978. On August 10, 1979, the Secretary adopted the findings of the administrative law judge and issued the recommended order. *See* 42 U.S.C. § 5851(b)(2)(B). Petitioner sought review of the order in a timely fashion in this court. *See* 42 U.S.C. § 5851(c)(1). Subsequently, Dr. Richter obtained leave to intervene in this proceeding and filed a petition to enforce the order.

Before reaching petitioner's claims, we dismiss Dr. Richter's petition for enforcement and dismiss him as a party. This court has no jurisdiction over any enforcement proceeding under 42 U.S.C. § 5851, which specifically requires enforcement proceedings in district court. At oral argument counsel for Dr .Richter conceded our lack of jurisdiction and Dr. Richter's dubious status as a party in this proceeding. We do not understand Dr. Richter to claim that he is adversely affected or aggrieved by the Secretary's order; therefore, we lack jurisdiction to enter-

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[1] *See* Appendix.

[2] The Honorable Samuel A. Chaitovitz, Administrative Law Judge.

tain his petition for enforcement.[3] 42 U.S.C. § 5851(c) (1). We dismiss on our own motion. Fed. R. Civ. P. 12(h).

We next address petitioner's claims that the order was not supported by substantial evidence or that the order was arbitrary and capricious under the standard of the Administrative Procedure Act, 5 U.S.C. § 706(2) (A), specifically made applicable to this proceeding by 42 U.S.C. § 5851(c) (1). No lengthy discussion is needed to dispose of these arguments; the largely undisputed chronology of events outlined above provides substantial support for the Secretary's order. Petitioner makes much of the failure of any of the witnesses who appeared in the administrative proceeding on Dr. Richter's behalf to testify to personal and direct knowledge of retaliatory motivation. There is no requirement for such testimony, and there was certainly circumstantial evidence to support the finding of retaliation. *Cf. Zoll* v. *Eastern Allamakee Community School District*, 588 F.2d 246 (8th Cir. 1978).

Petitioner also argues that members of the hospital staff testified as to the absence of retaliatory motive behind the reorganization during which Dr. Richter was terminated. According to petitioner, the Secretary's finding of retaliatory motive unjustifiably implies that hospital staff who testified to the contrary perjured themselves. But their testimony failed in the administrative law judge's view to explain the termination. The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to

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[3]We therefore do not agree with Dr. Richter's suggestion that we amend the Secretary's award of attorney's fees to provide compensation for work done in proceedings in this court. Dr. Richter did not become a person aggrieved or adversely affected by the Secretary's order because he incurred additional attorney's fees subsequent to that order. He is not entitled to attorney's fees for filing a petition for enforcement in a forum obviously lacking jurisdiction on the face of the statute. 42 U.S.C. § 5851(c), (d), (e).

the contrary by witnesses who perceived lack of such improper motive. *See The Struggle,* 13 U.S. (9 Cranch) 71 (1815); *Schultz & Lindsay Construction* v. *Erickson,* 352 F.2d 425 (8th Cir. 1965); 1 J. WIGMORE, EVIDENCE IN TRAILS AT COMMON LAW §§ 25-26 (1940). Moreover, there was testimony by Dr. Richter who expressed the opinion that retaliatory motive did cause the termination and by Dr. Canoy who thought retaliation was at least a part of the motive. We cannot find in the record any plausible explanation which does not include some element of retaliation for the proceedings against Dr. Richter six days after the Commission report, the sudden decline in Dr. Richter's evaluations and the decision to terminate him during a staff reorganization in which two less senior medical physicists were retained. We therefore conclude the Secretary's conclusion was supported by the evidence.[4] *Cf. Womack* v. *Munson,* 619 F.2d 1292 (8th Cir. 1980) (finding of retaliatory discharge under Title VII of the Civil Rights Act of 1964).

Petitioner also contends that the Secretary's order was contrary to its immunity under the eleventh amendment of the United States constitution, which petitioner asserts prohibits any administrative action against a state if initiated by a citizen. If so, the order would be improper

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[4]Petitioner also appears to argue that the Secretary's order is an abuse of discretion, *see* 5 U.S.C. § 706(2) (A), because the statutory provisions for licensing of medical therapy facilities provided for a "minimum amount of . . . regulation consistent with [the commission's] obligations . . . to promote the common defense and security and to protect the health and safety of the public." 42 U.S.C. § 2134(a). Petitioner seems to read this provision to mean that regulations are valid only if consistent both with the common defense and security and also with the public health and safety. Petitioner concedes that the Secretary's order protects public health and safety, but argues that the order is improper because it does not have any relation to common defense and security. We think this argument is frivolous. Protection of public health and safety is a valid objective under § 2134(a).

under the Administrative Procedure Act, 5 U.S.C. § 706(2)(B), prohibiting administrative action in derogation of constitutional right or immunity. Petitioner, however, cites no case law for the proposition that the eleventh amendment is any bar to administrative action, and we reject that position. The eleventh amendment bars *judicial* action, not action by Congress or the executive branch. *See generally* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 HARV. L. REV. 682 (1976). Courts have found no eleventh amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals. *See Marshall* v. *A & M Consolidated Independent School District,* 605 F.2d 186, 188-90 5th Cir. 1979) (action under Fair Labor Standards Act by Secretary of Labor on behalf of citizen to recover back pay not barred by eleventh amendment); *Brennan* v. *State of Iowa,* 494 F.2d 100 (8th Cir. 1974), *cert. denied,* 421 U.S. 1015 (1975) (*simil*). *See also Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare,* 411 U.S. 279, 285-86 (1973); *United States v. Mississippi,* 380 U.S. 128, 140-41 (1965). Implicit in these cases is the conclusion that administrative action against states pursuant to individual complaints does not run afoul of the eleventh amendment. For it would be absurd to hold that the eleventh amendment did not bar the Secretary from bringing a lawsuit, but did bar the Secretary from proceeding administratively to determine if the lawsuit was warranted. The eleventh amendment, therefore, is no bar to the Secretary's order.

We do not reach any question what effect the eleventh amendment might have in any potential enforcement proceedings that may occur under 42 U.S.C. § 5851(d) or (e) or other provisions, if the state should refuse to comply with the Secretary's order.

Accordingly, the order of the Secretary is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX

42 U.S.C. § 5851 provides in relevant part:

§ 5851. Employee protection

Discrimination against employee

(a) No . . . Commission licensee . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding . . . or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

Complaint, filing and notification

(b) (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (. . . the "Secretary") allegeging such discharge or discrimination. Upon receipt of such a complaint, the Sec-

retary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complain filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. . . . Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

Review

(c) (1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

Jurisdiction

(d) Whenever a person has failed to comply with an order issued under subsection (b) (2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

Commencement of action

(e) (1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

No. 80-1087

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ALEXANDER L. STE
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ELLIS FISCHEL STATE CANCER HOSPITAL, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
RUSSELL L. CAPLAN
Attorneys

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the Secretary of Labor's administrative proceedings and remedial order against petitioner, a state hospital, are barred by the Eleventh Amendment.

2. Whether the Secretary's findings and remedial order are supported by substantial evidence.

3. Whether the Nuclear Regulatory Commission regulation violated by petitioner exceeds the NRC's authority under 42 U.S.C. 2134 and (& Supp. III) 5851.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Brennan v. *Indiana*, 517 F. 2d 1179, vacated on other grounds, 427 U.S. 909 5

Brennan v. *Iowa*, 494 F. 2d 100, cert. denied, 421 U.S. 1015 5

District of Columbia v. *Train*, 521 F. 2d 971 5

Employees v. *Missouri Public Health Dept.*, 411 U.S. 279 5

Fitzpatrick v. *Bitzer*, 519 F. 2d 559, aff'd in part, rev'd in part on other grounds, 427 U.S. 445 5

Littell v. *Morton*, 445 F. 2d 1207 5

Marshall v. *A & M Consolidated Independent School District*, 605 F. 2d 186 5

United States v. *Mississippi*, 380 U.S. 128 5

PREVIOUS PAGE WAS BLANK

Page

Constitution, statutes, and regulation:

United States Constitution, Eleventh Amendment 4, 5

42 U.S.C. 2134 ..... 6, 7

42 U.S.C. 2134(a) 4

42 U.S.C. (Supp. III) 5851 ..... 4, 5, 6

42 U.S.C. (Supp. III) 5851(a) 4

42 U.S.C. (Supp. III) 5851(b)(2)(B) 4

10 C.F.R. 35.14(b)(5)(vii) 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1087

ELLIS FISCHEL STATE CANCER HOSPITAL, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-9 to A-16) is reported at 629 F. 2d 563.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1980. The petition for a writ of certiorari was filed on December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ellis Fischel State Cancer Hospital, a Missouri state facility, is licensed by the Nuclear Regulatory Commission to use radioactive material in medical diagnosis and therapy. Dr. Clifford Richter was hired in 1974 as petitioner's chief medical physicist. As the hospital radiation safety officer, Dr. Richter was assigned the task of

reporting to the NRC on petitioner's use of radioactive material (Pet. App. A-2 to A-3, A-10).

On March 28, 1978, a technician at the hospital examined a cancer patient who had been discharged three months earlier. The technician discovered that four seeds of iridium-192, a radioactive isotope, had been unintentionally left in the patient's body when she was discharged. (The seeds had been implanted as part of the patient's therapy.) The results of the examination were immediately reported to Dr. Richter in his capacity as radiation safety officer. The following day, Dr. Richter reported the incident to the NRC by telephone. The NRC found that the failure to remove the iridium violated condition No. 18 of the hospital's NRC license and 10 C.F.R. 35.14(b)(5)(vii) (Pet. App. A-3, A-10).[1]

Before his report to the NRC, Dr. Richter had consistently received extremely favorable work evaluations. In fact, in January 1978, the hospital administrator recommended that Dr. Richter be given a 39% increase in salary (Pet. App. A-3, A-11). Six days after Dr. Richter's report, however, the hospital executive committee met and critically discussed the medical physics department. Although Dr. Richter was a member of the executive committee, he was excluded from the meeting (*id.* at A-11).

From April through August 1978, Dr. Richter received three progressively less favorable evaluations of his work (Pet. App. A-11). On April 24, 1978, the hospital administrator wrote a memorandum to Dr. Richter, admonishing

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[1]The regulation requires that patients treated with iridium-192 implants remain hospitalized "until a source count and a radiation survey * * * confirm that all implants have been removed."

The NRC report also concluded that persons who came into contact with the patient were exposed to significant amounts of radiation but that the exposure was within allowable limits (Pet. App. A-10).

him for making the report to the NRC without first clearing it with the hospital administration and staff (Pet. App. A-3 to A-4). At approximately the same time, the executive committee, again meeting in Dr. Richter's absence, abolished the Medical Physics Department and made it a division within the Department of Radiation Therapy (*id.* at A-4, A-11). The minutes of an executive committee meeting in July 1978 contain the following statement (*id.* at A-11): "Apparently Dr. Richter is not going to resign despite his statement that he would if he lost his departmental director position." Also during the summer of 1978, after the hospital staff connected Dr. Richter to a newspaper article concerning storage of radioactive materials at the hospital, Dr. Richter was suspended for three days without pay and formally reprimanded for " 'fail[ing] to extend to the staff and administration * * * the professional courtesy to follow normal procedures in bringing problems to the attention of those persons ultimately responsible for the operation of the hospital' " (*ibid.*).

In October 1978, without consulting either Dr. Richter or Dr. Nestor Canoy, head of the Department of Radiation Therapy, the executive committee and hospital staff reorganized the Department to eliminate the chief physicist position occupied by Dr. Richter. In December 1978, Dr. Richter was notified that his position had been abolished and that he therefore would be terminated as an employee of the hospital (Pet. App. A-4). The Department of Radiation Therapy was reorganized into three medical teams, the division of medical physics was eliminated, and each of the two junior medical physicists at the hospital was assigned to one of the newly-created medical teams. Dr. Richter was not assigned to a team, even though he was the senior medical physicist, and even though Dr. Canoy testified that after Dr. Richter was dismissed the hospital did not have enough medical physicists (Pet. 9; Pet. App. A-11 to A-12).

2. Following his dismissal, Dr. Richter filed a complaint with the NRC, alleging that his employment had been terminated in retaliation for his report of the iridium incident. After an evidentiary hearing, an administrative law judge found that Dr. Richter was discharged because of his report to the NRC and that his firing therefore violated 42 U.S.C. (Supp. III) 5851(a) (Pet. App. A-5 to A-6). The administrative law judge recommended that Dr. Richter be restored to his position as chief medical physicist, that he recover back pay and attorney's fees, and that any adverse references added to his file after March 1978 be deleted (*id.* at A-6). The Secretary of Labor adopted the administrative law judge's findings and recommended decision and issued the recommended order, pursuant to 42 U.S.C. (Supp. III) 5851(b)(2)(B) (Pet. App. A-7 to A-8).

The court of appeals affirmed (Pet. App. A-9 to A-16), rejecting each of the arguments that petitioner now advances in this Court. The court of appeals ruled that the Secretary's order does not violate the Eleventh Amendment (*id.* at A-14 to A-15), that the order is supported by substantial evidence and is not arbitrary or capricious (*id.* at A-13), and that the Secretary's action does not exceed the scope of his authority under 42 U.S.C. 2134(a) and (& Supp. III) 5851 (*id.* at A-14 n.4).

ARGUMENT

The court of appeals' decision is clearly correct, and there is no conflict among the circuits on any of the questions presented by petitioner. Further review by this Court is not warranted.

1. Petitioner first contends (Pet. 11-16) that the administrative proceeding conducted by the Secretary and the resulting remedial order violate the Eleventh Amendment. The short answer to this argument is that the Eleventh Amendment says nothing about suits by the United States, its agencies, or its officers acting in their official capacity.

The Amendment confers an immunity that extends only to suits brought by private citizens. See generally *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 285-286 (1973); *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965). Although petitioner purports (Pet. 15) to have identified an inconsistency among the decisions of the courts of appeals in this regard, no such conflict exists.[2] On the contrary, the circuits are uniform in their holding that the Eleventh Amendment does not bar actions brought against the states by federal administrative agencies pursuant to complaints of private persons. See, *e.g.*, *Marshall* v. *A & M Consolidated Independent School District*, 605 F. 2d 186 (5th Cir. 1979); *Brennan* v. *Iowa*, 494 F. 2d 100 (8th Cir. 1974), cert. denied, 421 U.S. 1015 (1975); *Brennan* v. *Indiana*, 517 F. 2d 1179 (7th Cir. 1975), vacated on other grounds, 427 U.S. 909 (1976); *Fitzpatrick* v. *Bitzer*, 519 F. 2d 559 (2d Cir. 1975), aff'd in part, rev'd in part on other grounds, 427 U.S. 445 (1976); *District of Columbia* v. *Train*, 521 F. 2d 971 (D.C. Cir. 1975). And, as the court of appeals concluded, if the Eleventh Amendment does not bar the Secretary from bringing a lawsuit, "it would be absurd to hold" that the Amendment does preclude the Secretary "from proceeding administratively to determine if [a] lawsuit [is] warranted" (Pet. App. A-15). Petitioner's suggestion that the Eleventh Amendment prohibits administrative enforcement of 42 U.S.C. (Supp. III) 5851 is therefore without merit.

2. Petitioner also argues (Pet. 17-19) that the Secretary's findings with respect to the reasons for Dr. Richter's dis-

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[2] *Littell* v. *Morton*, 445 F. 2d 1207 (4th Cir. 1971), on which petitioner relies, does not involve the Eleventh Amendment at all. A private citizen sought review under the Administrative Procedure Act of action taken by the Secretary of the Interior, and the court of appeals addressed the question whether sovereign immunity might bar judicial review, even in situations where review appeared to be authorized by the APA. The case has no bearing on the question whether the states' immunity under the Eleventh Amendment extends to suits brought by the United States, its agencies, or its officers.

charge are not supported by substantial evidence and are arbitrary and capricious. As the court of appeals concluded (Pet. App. A-13), "[n]o lengthy discussion is needed to dispose of these arguments; the largely undisputed chronology of events * * * provides substantial support for the Secretary's order." Notwithstanding the testimony of petitioner's witnesses that Dr. Richter was not dismissed in retaliation for his report to the NRC, the Secretary and the court of appeals both were convinced that the abrupt change in the hospital administration's attitude toward Dr. Richter could be explained in no other way. In the court of appeals' words (*id.* at A-14),

> [w]e cannot find in the record any plausible explanation which does not include some element of retaliation for the proceedings against Dr. Richter six days after the Commission report, the sudden decline in Dr. Richter's evaluations and the decision to terminate him during a staff reorganization in which two less senior medical physicists were retained.

Moreover, petitioner's "substantial evidence" argument presents a completely fact-bound question that would not merit review in this Court, even if the support in the record for the Secretary's decision were considerably less weighty than it is.

3. Finally, petitioner asserts (Pet. 19-21) that the Secretary's action exceeds his authority under 42 U.S.C. (Supp. III) 5851 because Dr. Richter's reinstatement will not "promote the common defense and security." Petitioner has taken the quoted phrase from 42 U.S.C. 2134, which directs the NRC, in issuing licenses for the use of radioactive materials in medical therapy, to "impose the minimum amount of regulation consistent with its obligations * * * to promote the common defense and security and to protect the health and safety of the public." Petitioner's position apparently is that, unless a particular regulatory action

demonstrably advances *both* the "common defense and security" and the "health and safety of the public," it is not authorized by the relevant statutes.

The court of appeals correctly determined that "this argument is frivolous" (Pet. App. A-14 n.4). The NRC's regulation requiring that persons being treated with iridium-192 implants remain hospitalized until all implants have been removed is clearly designed to protect the public health and safety, and no further justification for the regulation is required under 42 U.S.C. 2134. Despite petitioner's contrary interpretation, that statute does not mean that NRC regulations regarding radiation therapy are invalid unless they serve both defense and health purposes. Regulations advancing either security or safety objectives are permitted by Section 2134.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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